Associated Milk Producers, Inc. *and* Chauffeurs, Teamsters and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 16-CA-8782 and 16-RC-8022

April 8, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On September 9, 1980, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions, as modified herein, and to adopt his recommended Order.

The Administrative Law Judge properly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, in September 1979,[1] by the following preelection conduct:[2] interrogating employees L. D. McDaniel and Charles Tingle about their union activities, soliciting their grievances, and creating the impression that they would be solved; and threatening McDaniel and Tingle with reductions in wages, hours, and retirement benefits, and with discharge on a pretext if the Union organized Respondent's employees.

The Administrative Law Judge also correctly concluded that Respondent violated Section 8(a)(1) and (3) of the Act by withholding until November 18 its systemwide wage increase of October 7 from the Crowley employees involved in this proceeding. In so doing, we rely on his rationale insofar as he found that said employees would have received the increase but for the presence of the Union.[3]

In addition, we agree with the Administrative Law Judge that Respondent's asserted reason for discharging Tingle on October 20, namely, his violation of a rule against removing equipment from a damaged truck, was pretextual, and that Respondent's "true reason" therefor was to punish Tingle for his union activities and to influence other employees to vote against the Union. In this connection, the Administrative Law Judge observed that it is "axiomatic that an employer under the Act may fire an employee for any or no reason so long as the discharge is not in whole or in part based on an employee's union or protected concerted activities." As the Board in *Wright Line*[4] abandoned the "in part" language, we disavow the Administrative Law Judge's statement in that regard.

Finally, the Administrative Law Judge correctly found merit in the Union's first and second objections in the election held on November 2, 1979, in Case 16-RC-8022, to the effect that Respondent's unfair labor practices also interfered with the election.[5] Although the Administrative Law Judge found no merit in the Union's third objection, which alleged that a letter sent to employees on October 29 contained misrepresentations that interfered with the election,[6] the Administrative Law Judge recommended, and we agree, on the basis of the two meritorious objections that the November 2 election should be set aside and that Case 16-RC-8022 be remanded to the Regional Director for the purpose of holding a new election. The Administrative Law Judge further recommended in light of Respondent's unfair labor practices that the Regional Director include in the notice of election the following paragraph consistent with the Board's Decision in *The Lufkin Rule Company*, 147 NLRB 341 (1964), and *Bush Hog, Inc.*, 161 NLRB 1575 (1966):[7]

Notice To All Voters

> The election conducted on November 2, 1979, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and

[1] All dates below refer to 1979.

[2] The election was held on November 2 with the results indicated below.

[3] See *Russell Stover Candies, Inc.*, 221 NLRB 441, 447 (1975), and *The Gates Rubber Company*, 182 NLRB 95, 98 (1970), which were properly invoked by the Administrative Law Judge. Accordingly, we do not find it necessary to adopt his alternative finding that the withholding of the increase, if not unlawful initially, subsequently became unlawful when Respondent iterated its unlawful reason to an employee.

[4] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[5] There were 15 votes for and 16 against the Union, and 1 challenged ballot, that of Tingle, who, as found above, was discriminatorily discharged and therefore entitled to vote. As the Administrative Law Judge pointed out, even if it is assumed that Tingle voted for the Union, the result would be a tie vote and a loss for the Union.

[6] In the absence of exceptions to this finding, we adopt it *pro forma*.

[7] In the absence of exceptions thereto, we adopt this recommendation *pro forma*.

hereby orders that the Respondent, Associated Milk Producers, Inc., Crowley, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.[8]

IT IS FURTHER ORDERED that the election conducted on November 2, 1979, among the Employer's employees be, and it hereby is, set aside, and that Case 16-RC-8022 be, and it hereby is, severed and remanded to the Regional Director for Region 16 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[8] We hereby correct the Administrative Law Judge's Order and notice which state that the wage increase was withheld from the Crowley employees until November 13 rather than November 18.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was heard before me at Fort Worth, Texas, on April 22, 1980. The case was heard pursuant to a report on objections, order consolidating cases and notice of hearing issued by the Regional Director for Region 16 of the National Labor Relations Board on November 28, 1979. The order consolidating cases consolidated: a complaint in Case 16-CA-8782 issued by the Regional Director on November 27, 1979, based on a charge filed by Chauffeurs, Teamsters and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), on October 25, 1979, and amended on November 26, 1979, against Associated Milk Producers, Inc. (herein Respondent or the Employer), and a hearing on objections, based on the Charging Party's objections to the election held among Respondent's employees on November 2, 1979, in Case 16-RC-8022, filed by the Union on September 13, 1979.

The complaint, as orally amended at the hearing, alleges certain statements by agents of Respondent as violative of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, and the withholding of wage increases to employees at Respondent's Crowley, Texas, facility and the discharge of employee Charles Tingle as violative of Section 8(a)(3) and (1) of the Act. Respondent, admitting the agency status of the individuals involved, denies the occurrence of statements violative of the Act. It admits the termination of Tingle and the withholding of the wage increase, but asserts these actions were taken for nondiscriminatory reasons.

The issues raised by the report on objections[1] include the conduct alleged in the complaint and an additional allegation that Respondent made prejudicial misrepresentations in a preelection letter to employees.

All parties were given opportunity to participate at the hearing, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

Upon the entire record herein, including the post-hearing brief of each party, and from my examination of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kansas corporation with corporate headquarters in San Antonio, Texas, division offices in Amarillo, Texas, and distribution facilities in Crowley, Texas. Respondent annually, in the course of its business operations, has gross sales in excess of $500,000 and purchased goods and services valued in excess of $50,000 which are shipped directly to its Texas facilities from points located outside the State of Texas.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE EVENTS

A. *Background*

Respondent is involved in the transportation of milk. Its operations are divided into three regions including the Southern Region. There are seven divisions in the Southern Region including the Dallas-Fort Worth Division. The Dallas-Fort Worth Division has Texas facilities at Crowley, Sulphur Springs, Sanger, and Stephenville-Comanche. The Crowley facility (sometimes referred to as the facility) employs local and transport truckdrivers and mechanics. At relevant times there were approximately 34 such employees at the facility.

Some years ago, the Union had attempted unsuccessfully to organize Respondent's Crowley employees. It again commenced an organizing campaign in 1979.[2]

In very early September a fellow driver at the Crowley facility asked long-time employee L. D. McDaniel to solicit employee support for the Union. McDaniel agreed and immediately commenced such activity. The Union, by letter dated September 7, informed Respondent of its organizing campaign and identified McDaniel as active in that campaign.

B. *Evidence Concerning Statements Alleged as 8(a)(1) Violations*

McDaniel testified that on or about September 7, after he had completed his day's driving assignment, he spoke alone with Location Supervisor J. D. Foster in Foster's office. Foster asked McDaniel if he knew anything about union cards being handed out to employees. McDaniel responded that he did and offered Foster an authorization card, which Foster declined. Foster asked McDan-

[1] The parties did not seek review of the Regional Director's report on objections and all parties properly treated the matters resolved therein, such as the issue of the service of the objections upon Respondent, as no longer in issue.

[2] All dates hereinafter refer to 1979 unless otherwise noted.

iel, in McDaniel's recollection, if "I thought that was going to do any good." McDaniel answered, "I thought it was probably the only way we had the way it looked." Foster testified that he had learned of union activity from an employee on the date a letter concerning the Union had been signed; i.e., September 7. Foster could not recall the above conversation with McDaniel.

McDaniel testified to a conversation with Jack Hagler, then Respondent's Fort Worth division manager, and Foster on September 10 in the Crowley facility employee break room. Hagler told McDaniel he had received the letter from the Union and "he wanted to know what was the problem." McDaniel responded that he desired increased compensation. Hagler referred to a previous wage increase and noted that it was "the best they could do." Hagler suggested he opposed the Union and the conversation ended. Hagler did not address this conversation in his testimony. Foster was unable to recall this conversation with McDaniel.

Former employee Charles Tingle testified that, on September 12 or 15, he completed his run and was called into Foster's office where he had a conversation with Foster and James McAdams, Respondent's transportation manager. Tingle testified that Foster asked him if he had received a union card and if he were going to sign it. Tingle replied that he had received a card and had already signed it. Foster then asked if Tingle knew what the card meant. Tingle replied that he did not, but that he was going to a meeting that evening to form an opinion on which way he was going to vote in the election.[3] Foster opined that the Union would hurt the Employer. Tingle disagreed stating employees "needed something anyway and we weren't going to lose anything, and it didn't cost anything to vote one way or the other.

Tingle testified that Foster and McAdams then asked him questions "about what I thought the location needed." Tingle suggested Respondent provide a mechanic on weekends. McAdams said that had been tried before and did not work out.

McAdams could recall having a single conversation with Tingle concerning the Union although he was not asked its date. He testified that during the conversation Tingle told him that he had signed a union card. McAdams further testified, "I asked [Tingle] what problems we had that he felt we needed to correct within our organization." He recalled Tingle's response as being that Tingle did not like the type of trucks the Company was using. Foster did not recall this conversation.

Tingle testified to a conversation in the office with Foster and Janice Dickerson, a transportation clerk/secretary—not a unit position, at the end of his workday on September 15. In a discussion about the Union, Foster asked Tingle his views. Tingle told Foster he was for the Union and was going to vote for it. As the conversation developed, Foster asked Tingle what had been discussed at the union meeting. Tingle replied the main topics were retirement and insurance. Insurance and retirement were then discussed and as Tingle characterized it, the "discussion got pretty heavy." Tingle testified that, at this point in the conversation, L. D. McDaniel entered the room and joined the discussion.

Tingle testified that Foster then said that Respondent "could bust your [sic] back on your retirement" and "could cut us back to 40 hours a week and minimum wage." Foster continued in Tingle's recollection to state that if Respondent "did go union that the dairymen could buy milk trucks and they could haul their milk independently like they did years ago." Foster added further that if Respondent wanted to fire somebody during the union election, "they could find a hundred and one reasons to fire somebody."

McDaniel testified that on September 15 he came upon and joined a conversation among Dickerson, Foster, and Tingle. McDaniel testified:

> Well, they was discussing the union and it was getting along pretty good on it really.

Foster asked McDaniel what he thought about the Union and he answered that "we had to try it, it was the only way to go." McDaniel recalled Foster said that Respondent could take away union benefits and go back to leasing trucks from individuals to haul milk as they had done in prior years. He also recalled Foster saying that "under the union" Respondent "could come up with a lot of ways of firing a person, you know, just if they wanted to get rid of them.

Dickerson did not testify. Foster did not recall ever having had a conversation with McDaniel and Tingle present in the office during this period.

C. *The Omitted Wage Increase*

Respondent, until October, had a practice over many years of granting single annual across-the-board wage increases in or about June. This had been the case in 1979. On September 21, Respondent's division management learned that, as a result of changes in the interpretation of language in applicable Federal Wage and Price Guidelines, divisional employees could receive an immediate additional 8-percent across-the-board wage increase. Effective October 7, all divisional employees, except the Crowley location employees, received an 8-percent increase. On advice of counsel, because of the union campaign and forthcoming election, Respondent did not give Crowley employees the increase. On or about November 18, Crowley employees were given the wage increase although it was prospective rather than retroactive to October 7.

McDaniel, in the course of his duties, has occasion to see drivers from other divisional facilities on a regular basis. He learned on an uncertain date from such employees that they had been told a day or two before that they were going to receive a raise. McDaniel testified to a conversation with Foster on or about September 15 in which he asked Foster about a raise and Foster said he did not know anything about it. McDaniel testified to a second conversation, by telephone, with Foster on October 20, 1979. The conversation concerned the following day's assignment but then turned to the raise. Foster told McDaniel that the Crowley employees would not be receiving the raise. McDaniel testified that Foster told him:

[3] Tingle testified he attended a union meeting on September 12, thus placing this conversation on September 12 rather than on September 15.

"Well, he said [what] with the union activity they couldn't give the raise; it would interfere with it." While conceding a "slim" possibility he had raised the matter of the Union, McDaniel said he did not think he first mentioned the Union or union activities in the conversation.

Tingle testified to an October 12 conversation in the office with Foster, James Raifsnider,[4] and W. W. Spoon, employees of Respondent. During the conversation Tingle made it clear he was in favor of the Union. The discussion included union retirement benefits.

During that conversation, Tingle testified that he and Spoon asked

> [I]f the reason they got the eight percent raise was because the union talked at the Crowley yard and that we hadn't received one, and they said it couldn't come in effect until October the 1st . . . J. D. Foster said they couldn't put it in the budget until October the 1st.

Tingle testified a second time to the comments regarding the wage increase:

> W. W. Spoon and I both asked James Raifsnider and J. D. Foster if the reason that the other yards got the eight percent raise was because of the union talk at Crowley and they said definitely it wasn't, that it was going to be decided in the budget for October 1st.

Neither Spoon nor Raifsnider testified. Foster testified that he learned of the raises at other facilities at or about the time they were issued, i.e., on October 7. He was unable to place exactly when he learned the Crowley employees would not receive the wage increase. He further testified that whereas he did not "really" know the reason the Crowley employees did not receive the raise:

> Well, I didn't think they could give a raise when they was having an election or something like that. I had heard this.

Without establishing a date, Foster recalled McDaniel asking him about a raise that had been issued to other locations. He recalled telling McDaniel that he did not know why Crowley employees had gotten a raise. He did not testify concerning the other remarks attributed to him concerning the wage increase.

D. *The Discharge of Tingle*

Charles Tingle had been employed as a truckdriver hauling raw milk since March 1978. He was fired on October 20 and had not been offered reinstatement as of the time of the hearing. He voted under challenge in the November 2 election; however, the challenge was not determinate of the results of the election and was withdrawn.

Respondent at its Crowley facility operates both owned and leased trucks. Tingle's regular truck was owned by Respondent. For some time Tingle was dissatisfied with the suspension system of the driver's seat. Apparently some mechanical malfunction prevented the seat from absorbing road shock. Tingle's routes included nonpaved roads and he felt repair or replacement of the seat was desirable. He had complained to the facility maintenance staff concerning the matter without result.

On October 16 an employee of Respondent operating a leased truck had a fatal accident. The heavily damaged truck was brought on a flatbed truck to the Crowley facility on October 17 pending resolution of the complications arising out of the accident. The damaged rig was off loaded at the facility on October 19.

Tingle saw the damaged rig in the yard on October 17. On October 18, Tingle and several other employees were sitting in the Crowley yard along with Melton Laboski. Laboski was regularly involved in truck maintenance and repair at the facility. Tingle believed at the time he was the shop foreman, but in actuality he was a unit employee who voted in the election without challenge. Tingle asked Laboski what was to be done with the seats in the damaged truck. Laboski answered that there was nothing that could be done with them, that they would be "salvaged out." Tingle asked Laboski if he could take a seat from the wrecked vehicle and substitute it for the defective seat in his own truck. Laboski responded, "Hell, I don't care. A.M.P.I. bought that truck when it hit the bridge."[5] Tingle also testified that he asked and received permission from Laboski to also remove the side door panels and armrests from the damaged truck so he could install these parts as well in his assigned vehicle.

That same day, Tingle removed the parts described from the damaged truck and substituted these parts for those in his own rig. To do so he drilled new mounting holes in appropriate places. The now removed original seat, side door panels, and armrests from his truck were placed with the damaged truck.

McAdams testified that he received a call on the evening of October 19 from Foster who told him that Tingle had removed the seat from the damaged truck and had installed it in his own company truck. McAdams consulted with his superior Dallas-Fort Worth Division Manager Hagler the next morning and told him that he felt Tingle should be terminated for his actions. Hagler gave McAdams permission to do what he thought right.

McAdams went to the Crowley facility on October 20 and spoke to Tingle. McAdams testified he called Tingle to the office as Tingle ended his route. He asked Tingle if he had taken the seats from the damaged truck and installed them into his own assigned truck. Tingle said he had. McAdams continued:

> I asked him why, I believe, at that time, and he said because he wanted them, something to this effect. I asked him, I believe, if he had permission at that time and he told me he had talked to Melton Laboski.

[4] Raifsnider was identified by Tingle as the location supervisor's assistant. The General Counsel had originally pled Raifsnider as assistant yard supervisor. Respondent denied the allegation and the General Counsel withdrew it at the commencement of the hearing as well as a paragraph alleging certain conduct by Raifsnider on October 12. Raifsnider was on the agreed-upon voter eligibility list.

[5] The statement of Laboski, virtually identical to the testimony of McAdams at the hearing, refers to the fact that Respondent purchases from lessors those vehicles destroyed while in Respondent's custody

I told him that he knew that Melton Laboski was not his supervisor, that J. D. Foster was his supervisor, and that I was terminating him.

Tingle testified that upon reaching the office McAdams told him to "punch the timeclock you're terminated as of now." Tingle asked why whereupon McAdams told him he had stolen the seats out of the wrecked truck and that he had spread rumors that the driver of the truck was using alcohol and drugs.

Tingle told McAdams he had taken the seat of the truck, but that he had done so with the permission of Melton Laboski and that his own seat was broken. McAdams told Tingle, Laboski did not have "any kind of authority to say anything like that." Tingle then turned to Foster who was also in the office. Foster, however, only pointed to McAdams and said "that's the man you go to talk to."

Tingle offered to return the seat, but was told "that wouldn't do." Tingle then challenged McAdams by asserting that the proffered reason for his termination was not the true reason. McAdams answered: "Well that's reason enough." Tingle then gathered his belongings and left the facility. He had not been offered reinstatement as of the time of the hearing. Foster did not testify regarding these events.

Tingle testified without contradiction that he had previously neither received a reprimand nor been told his work was unsatisfactory, although he did admit he had been talked to about his driving. He further testified that Foster had discussed a promotional opportunity with him. Respondent was apparently considering giving Tingle the position. The promotion did not occur however. Tingle testified that Foster had told him that he had a good future with the Company. Foster did not testify regarding these matters.

E. *Election Campaigning and Result*

Respondent sent to employees a letter dated October 29, 1979, which was received by employees on or about October 30. The letter contained campaign material. The Union sent a letter to the employees on October 31, received on or about November 1, which addressed certain of the contentions contained in Respondent's October 29 letter. A meeting of employees was also held by the Union on the evening of November 1, although it was not attended by all employees.

On November 2 the election was held with the Union losing by a single vote with Tingle's vote challenged. Since, assuming Tingle's vote was in favor of the Union, his challenged vote could at best have resulted in a tie vote which results in a loss for the Union, the challenged vote was not determinative of the results of the election. On November 9 the Union filed objections to the conduct of the election.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

Statements Alleged as Violative of Section 8(a)(1) of the Act

Tingle and McDaniel creditably testified to a variety of conversations with admitted agents of Respondent: Foster, McAdams, and Hagler. Foster generally professed an inability to recall the conversations. He impressed me as a witness lacking in candor who, now uncomfortable with his conduct in issue, had determined to avoid responsibility for his actions by failing to recall them. I specifically discredit Foster whenever his testimony is inconsistent with that of Tingle or McDaniel. Hagler did not testify concerning the statements attributed to him. McAdams' recollection of the conversations, while fragmentary, was not directly inconsistent with that of McDaniel and Tingle. I found his demeanor to be significantly less than that of Tingle and McDaniel and also discredit McAdams where his testimony is inconsistent with Tingle or McDaniel.

Based on the above, I specifically find that Respondent engaged in the conduct attributed to them by Tingle and McDaniel as set forth in section III, b, *supra.* Thus on September 7, Foster interrogated McDaniel about his union activities; on September 10, Hagler solicited McDaniel's grievances and created the impression he would solve those grievances to discourage support for the Union; on September 12, Foster and McAdams interrogated Tingle about his union activities, solicited his grievances, and created the impression they would solve those grievances to discourage support for the Union; on September 15, Foster interrogated Tingle concerning his support for the Union, threatened Tingle and McDaniel with reductions in wages, hours, and retirement benefits if the Union organized Respondent, and threatened them with discharge on a pretext if the Union successfully organized Respondent.

While the complaint does not without exception correctly allege the date each incident occurred, it is not so inaccurate as to be prejudicial to Respondent and the conduct in question was fully litigated. Respondent, by engaging in the conduct described above, violated Section 8(a)(1) of the Act.

The Withheld Wage Increase

There is no dispute with respect to the facts concerning Respondent's decisionmaking process and implementation of the October wage increase. Respondent had a longstanding practice of granting single, divisionwide, across-the-board wage increases in the summer of each year. It did so in 1979. After the filing of the petition on September 13 and for objective reasons unrelated to union activity at Crowley, Respondent's divisional management learned that a substantial across-the-board wage increase was to be issued. Respondent's counsel advised that the increase be withheld at Crowley due to the petition and pending election. This wage increase was granted to all division employees effective October 7 except the Crowley yard. The increase was granted Crowley employees effective November 18.

, The General Counsel and the Union contend the delay in granting the increase at Crowley was improper. The General Counsel argues further that, even if the withheld increase was not *per se* illegal, it became so when Respondent omitted to explain its rationale of withholding to employees. Respondent argues its actions were necessary and proper.

The Board's rule with respect to the granting or withholding of wage increases during union organizing is simply stated, but its application varies. An employer must take the action that it would have taken were there no union activity underway. The Board places an affirmative duty on employers who grant wage increases during the pendency of an election petition to come forward with an explanation for the increase. Where an employer has decided to grant a wage increase, but has no objective evidence of the innocent reason for the increase, the Board has allowed the benefits to be withheld by the employer in order that it may avoid risking unlawful interference with the election. *The Singer Company, Friden Division*, 199 NLRB 1195 (1972); *Great Atlantic & Pacific Tea Company, Inc.*, 192 NLRB 645 (1971).

Where the increase withheld from employees is a normal one so that a normal course of action is altered because of employees' union activities, the employer violates Section 8(a)(1) and (3) of the Act. *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); *The Gates Rubber Company, Inc.*, 182 NLRB 95 (1970). The Board has also held that a good-faith belief by an employer that it could not award a wage increase because of the existence of a representation petition is not a defense to otherwise violative conduct. *Dorn's Transportation Company, Inc.*, 168 NLRB 457 (1967). Nor is the possibility of being exposed to unsustainable allegations of wrongdoing by another party a defense to actions resulting in a denial of employees' statutory rights. *GAF Corporation*, 196 NLRB 538 (1972).

Respondent seeks to characterize its October increase as unusual, irregular, and not based on business considerations. It argues that, had it granted the wage increase to Crowley employees, it would have been unable to justify its decision to do so and would therefore have been held to have violated the Act. It notes further that it "attempted to minimize the impact of the legal dilemma it found itself in by not discussing the wage increase in any communications with its employees."

Respondent's October wage increase, viewed from the prospective of the Crowley location, had aspects of both regularity and irregularity. Respondent is correct that an October increase was unprecedented, that the traditional annual increase had already been awarded, and that there was no reasonable expectation by any divisional employees of such an increase. On the other hand, there was undisputed evidence that the increase was decided upon by higher officials free from any consideration of the union campaign at the Crowley facility. More importantly, the increase was given to all division employees, save Crowley employees, and Crowley had a longstanding history of receiving increases at the same time as other divisional units.

Where, as here, a systemwide increase is put in effect in a manner free from union considerations, the withholding of that increase at a subdivision unit undergoing union organization is not necessary to avoid risking unlawful interference with the election as in *Singer, supra*. This is so because the systemwide application does what a regular pattern of wage increases does in other circumstances—provides the evidence necessary to demonstrate that the increase was given free from union or other prohibited considerations. On this record, there can be no contention that Respondent would have been at risk had it granted the wage increase at Crowley at the same time all other divisional facilities received their increase. The increase was occasioned by independent events totally unrelated to the Crowley union election campaign and Respondent had a long history of treating Crowley as an integral part of its division.

The Board has considered systemwide changes in wages and benefits as "normal" or free from improper considerations without inquiry as to their historical pattern and has found the withholding of such an increase at a single facility during preelection campaigning to be violative of Section 8(a) (1) and (3) of the Act. *Russell Stover Candies, Inc., supra*. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by withholding its systemwide increase from its Crowley facility employees because of the pendency of the representation petition.

Even were I to have concluded that the withholding of the increase was not improper from its inception, I would find it became so when Respondent told at least one employee that the raise was withheld because of union activity.[6] *Sta-Hi Division, Sun Chemical Corporation*, 226 NLRB 646 (1976).

The Discharge of Charles Tingle

Employee Tingle was discharged on October 20, 1979. Respondent asserts that he was fired for violating a rule against removing equipment from damaged vehicles. It correctly notes on brief that "an employer has the right to discharge for good cause even the most active and outspoken union organizer." The General Counsel contends that the asserted reason for the discharge was pretext with the actual reason being Tingle's sympathy and support of the Union.

It is now axiomatic that an employer under the Act may fire an employee for any or no reason so long as the discharge is not in whole or in part based on an employee's union or protected concerted activities. Thus, in this sense, it is immaterial whether an employer had "good cause" or not when it discharged an employee. Where, however, the discharge is assertedly for reasons other than those offered by the employer, it is appropriate to examine the circumstances of the discharge to determine not if the employer's reasons were sufficient but rather if they were in fact the true cause of the discharge. Where there is an absence of credible explanation for the discharge, it may be inferred that the discharge was motivated by reasons prohibited by the Act. *Shattuck Denn*

[6] I again credit the testimony of McDaniel over Foster, to the extent Foster's limited recollection contradicted McDaniel, and find that Foster told McDaniel that the Crowley facility employees would not be getting the raise because of union activity.

Mining Corporation (Iron King Branch) v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966); *General Thermo, Inc.*, 250 NLRB 1260 (1980).

For the reasons hereinafter set forth, I find that Respondent's asserted reason for the discharge of Tingle was pretext and that the true reason for his discharge was his union activities and the expectation of Respondent that his discharge would have a chilling effect on employee expression of their voting preferences in the forthcoming election. Accordingly, I find that Respondent by discharging Tingle has violated Section 8(a)(1) and (3) of the Act.

The predicate to my determination that Tingle was discharged because of his union activities is the illegal conduct of Respondent's agents as described, *supra*, under my analysis of conduct alleged as violative of Section 8(a)(1) of the Act. Respondent came to learn of Tingle's intention to vote for the Union and general prounion sympathies on or about September 15. In addition to illegally threatening loss of benefits, Respondent's agents suggested to Tingle that union supporters could be terminated for contrived reasons. Thus, not only had the General Counsel proved knowledge of Tingle's union activity and union animus on the part of Respondent, but also it established a threat to discharge union supporters for false reasons. Tingle's "discharge is thus a fulfillment of this prophecy." *General Thermo, Inc., supra* at fn. 4.

Tingle's actions, which were asserted as the cause of his discharge, are not in dispute. Tingle, with the prior consent of the yard mechanic, substituted functional components taken from a damaged vehicle for inoperative components in the company vehicle he was assigned. In so doing he drilled mounting holes in his vehicle.[7]

This conduct was reported by Foster to McAdams who contacted his superior. McAdams, receiving permission to do what he thought right, then terminated Tingle. I have previously found agents Foster and McAdams have violated the Act and I have discredited their testimony to the extent it was contradicted by employees McDaniel and Tingle. I here discredit their testimony to the extent that it asserts that Tingle's discharge was not for prohibited reasons.

My findings herein do not rest solely on demeanor evidence and my previous findings with respect to Respondent's agents' knowledge and animus regarding Tingle and other employees' union activities. Two inconsistencies exist with respect to the discharge which critically undermine Respondent's defense.[8] First, employee knowledge of and the previous application of the purported rule against transferring parts from damaged equipment was much in doubt. Second, Respondent neither investigated the contention of Tingle that he had received permission to remove the seat from Laboski, nor punished Laboski for his giving Tingle permission to undertake the switch.

The rule Respondent asserted in defense of its termination was that employees are not permitted to remove parts from damaged vehicles unless and until the vehicle had been released to the location and the location manager supervises their removal. This rule or instruction was apparently orally transmitted to location management, but there is no evidence that the rule was in writing or that employees were made aware of the rule. Rather, the record reflects that neither Tingle nor the other employees present when Tingle asked Laboski for permission to remove the parts nor Laboski considered that Tingle was proposing that a rule be broken when he asked to remove the seat from the damaged vehicle. Moreover, there is additional evidence, which I credit, that employees had been taking parts from damaged vehicles previously without criticism or discipline. No evidence was introduced that any employee has ever been warned or otherwise disciplined, let alone discharged, for violating this rule.

Respondent's position is that the rule and its enforcement are important to Respondent's business operations and the termination to Tingle for a violation was done free from union considerations. One must leave establishment of rules and the severity of punishment for a violation of such rules to Respondent. Yet it appears to me to be inconsistent with Respondent's enforcement of the rule against Tingle that no action of any kind was taken against Laboski for assertedly giving Tingle permission to make the switch. Inasmuch as mechanics have admitted authority in some circumstances to remove parts from damaged vehicles, it would seem proper that Laboski should have been reprimanded and/or informed that he was not to issue such permission in the future. The record is silent on these matters.

Lastly, I find the discharge under all the above-described circumstances to be a severe punishment for an infraction which involved open conduct not designed to improperly benefit an employee or to convert Respondent's property to private uses. The apparent unreasonableness of the punishment here carries an inference that the asserted reason for the discharge was pretext.

In summary, I find that Respondent had knowledge of Tingle's union activities and his intention to vote for the Union. It had animus against the Union as demonstrated by the various threats, interrogations, and solicitations of grievances undertaken against employees, including Tingle. It made a specific threat to Tingle that union supporters could be fired for false reasons. I find that Respondent's agents, Foster and McAdams, whom I have discredited, *supra*, fired Tingle because of his union sympathies and in order to influence other employees to vote against the Union.[9] Respondent's asserted reason for the discharge I find to be mere pretext. Having so found, I further find that Respondent, by firing Tingle for his union sympathies, violated Section 8(a)(3) and (1) of the Act.

[7] I do not accept the contention that these mounting holes, which were revealed when the damaged vehicle parts were removed from Tingle's truck, constitute more than cosmetic damage to the rig.

[8] Additional evidence auguring against Respondent's contention is the lack of warning or punishment less than discharge given to Tingle. This is especially true where there was no dispute that Tingle had been a not unsatisfactory employee, mentioned for possible consideration for promotion, and that he had had no prior warnings or reprimands.

[9] The discharge of a union supporter just before an election is likely to reduce support for the Union. Respondent strongly opposed the Union and well knew the effect on others Tingle's discharge would have.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent withheld a wage increase at the Crowley facility in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondent to make the Crowley facility employees whole by paying them the amount they would have received if the wage increase had been given them at the same time as other division employees.

Having found that Respondent terminated the employment of Charles Tingle because of his union activities and sympathies in violation of Section 8(a)(3) and (1) of the Act, I shall order that Respondent offer Tingle immediate and full reinstatement to his former position of employment, discharging if necessary any replacements hired to fill his position, or, if said position no longer exists, to a substantially equivalent position. I shall order that Respondent make Tingle whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him by payment of a sum equal to that which he normally would have earned from the date of the discrimination to the date Respondent offers him reinstatement, less his net earnings during that period. Backpay shall be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950).

I shall order Respondent to pay interest on the above described sums in accordance with the policy of the Board set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), see also *Olympic Medical Corporation*, 250 NLRB 146 (1980), and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

V. OBJECTIONS

The Union's objections will be dealt with *seriatim*.

Objection 1: The Union's first objection tracks essentially the 8(a)(1) allegations in the complaint occurring after the filing of the petition and also includes the discharge of Tingle. I have found certain violations of Section 8(a)(1) of the Act occurring after the petition was filed and have further found that Tingle was discharged because of his union activities in violation of Section 8(a)(3) and (1). Such violations also constitute objectionable conduct, *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962). Accordingly, I find that the Union's Objection 1 has merit and should be sustained.

Objection 2: The Union's second objection alleges as objectionable conduct the delayed wage increase discussed *supra*. For the reasons there asserted, I found the delay in the wage increase violated Section 8(a)(3) and (1) of the Act. Such a violation also constitutes objectionable conduct. Accordingly, I find that the Union's Objection 2 has merit and should be sustained.

Objection 3: The Union objects to 8 of 22 numbered paragraphs contained in Respondent's October 29, 1979, letter to employees which was received by employees on October 30, 1979. Even assuming that Respondent's letter contained misrepresentations which would otherwise require a new election, the Board's lead case in the area, *Hollywood Ceramics Company, Inc.*,[10] also requires that in misrepresentation cases the injured party must have been denied an opportunity to effectively reply.

In the instant case the Union mailed a letter to employees on October 31, 1979, meeting the representations in Respondent's October 29, 1979, letter. It also held a union meeting on November 1, 1979, wherein the disputed representations were addressed. I find that time provided the Union here was sufficient to reply to Respondent's alleged misrepresentations. The Board in *Illinois Central Community Hospital*, 224 NLRB 632 (1976), adopted the Administrative Law Judge's recommendation that a union had sufficient time to reply to an employer's January 10 letter before the January 14 election. In *Montana Lumber Sales, Inc. (Delaney & Sons Division)*, 185 NLRB 46 (1970), the Board held a union was not precluded from replying to an employer's letter delivered to employees the day before the election because the union held an employee meeting that same evening at a time when it was aware of the employer's letter.

Inasmuch as I have found that, even if Respondent's October 31, 1979, letter contained misrepresentations, sufficient time for a reply existed, I shall not address the contents of Respondent's letter or the Union's specific objections thereto. This is so for, given time to reply, the alleged misrepresentations of Respondent cannot be found to have improperly affected the election results. Based on all the above, I shall recommend that the Union's Objection 3 be overruled.

Recommendation that new election be directed: In view of my recommendation that the Union's Objections 1 and 2 have merit and should be sustained, I recommend that the results of the election held on November 2, 1979, be set aside and that Case 16-RC-8022 be remanded to the Regional Director for Region 16 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of bargaining representative.

I further recommend, in light of the unfair labor practices found *supra*, and my determination that Respondent's conduct was designed to and succeeded in interfering with the employees' exercise of a free and reasoned choice in the November 2, 1979, election, that the Regional Director include in the notice of election to be issued the following paragraph consistent with the Board's decisions in *The Lufkin Rule Company*, 147 NLRB 341 (1964), and *Bush Hog, Inc.*, 161 NLRB 1575 (1966):

> Notice To All Voters
>
> The election conducted on November 2, 1979, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that

[10] 140 NLRB 221 (1962); overruled in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), but restored to vitality in *General Knit of California, Inc.*, 239 NLRB 619 (1978).

the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act and committed unfair labor practices within the meaning of Section 8(a)(1) of the Act by:

(a) On September 7, 12, and 15 interrogating employees about their union activities.

(b) On September 10 and 12 soliciting the grievances of employees and creating the impression said grievances would be resolved in order to discourage support for the Union.

(c) On September 15 threatening employees with reduction in wages, hours, and retirement benefits if the Union organized Respondent.

(d) On September 15 threatening employees with discharge on a pretext if the Union organized Respondent.

4. Respondent discriminated against employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act by:

(a) From on or about October 7 to on or about November 13 withholding a wage increase from employees at the Crowley facility.

(b) On October 20 discharging employee Charles Tingle and at all times thereafter failing and refusing to offer him reinstatement.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. By the above conduct, as alleged by the Union in its objections, Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on November 2, 1979, in Case 16–RC–8022.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Associated Milk Producers, Inc., Crowley, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities.

(b) Soliciting the grievances of employees and creating the impression said grievances would be solved in order to discourage support for Chauffeurs, Teamsters and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(c) Threatening employees with reduction in wages, hours, and retirement benefits if the Union organized Respondent.

(d) Threatening employees with discharge for a false reason if the Union organized Respondent.

(e) Withholding wage increases from employees because of their union activities.

(f) Discharging employees because of their union activities and sympathies.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Pay to Crowley facility employees the wage increase paid to other divisional employees but withheld them from on or about October 7, 1979, to on or about November 13, 1979, with interest, in the manner set forth above in the section entitled "The Remedy."

(b) Offer to Charles Tingle immediate and full reinstatement to his former position of employment discharging, if necessary, any replacements hired to fill his position or, if said position no longer exists, offer him a substantially equivalent position without loss of seniority or other benefits.

(c) Make Charles Tingle whole for any loss of benefits he may have suffered by reason of Respondent's discrimination against him by payment of a sum equal to that which he normally would have earned from the date of the discrimination against him to the date Respondent offers him reinstatement less his net earnings during that period, with interest, in the manner set forth in the section entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze and determine the amount of money due under the terms of this Order.

(e) Post at its Crowley, Texas, facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER RECOMMENDED that the first and second of the Union's objections to the election held by the Board in Case 16-RC-8022 be sustained, and that the results of said election be set aside, and that said case be remanded to the Regional Director for Region 16 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative and with a notice of election consistent with the findings herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice and to obey its provisions.

The National Labor Relations Act gives employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT interrogate employees concerning their union activities.

WE WILL NOT solicit the grievances of employees and create the impression said grievances would be resolved in order to discourage support for Chauffeurs, Teamsters and Helpers Local 47, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT threaten employees with reduction in wages, hours, and retirement benefits if Chauffeurs, Teamsters and Helpers Local 47, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, organized our employees.

WE WILL NOT withhold wage increases from employees because of their union activities.

WE WILL NOT discharge employees because of their union activities and sympathies.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

WE WILL pay to our Crowley, Texas, facility employees the wage increase paid to other divisional employees but withheld from them from on or about October 7, 1979, to on or about November 13, 1979, with appropriate interest.

WE WILL make Charles Tingle whole for any loss of benefits he may have suffered by reason of our discrimination against him by payment of a sum equal to that which he normally would have earned from the date of the discrimination against him to the date of our offer of reinstatement less his net earnings during that period, with appropriate interest.

ASSOCIATED MILK PRODUCERS, INC.